

Bunby (Migration) [2021] AATA 105 (15 January 2021)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Robert Christopher Bunby Mrs Mandy Elizabeth Bunby Mr Dion John Bunby Master Lewis Robert Bunby Miss Holly Elizabeth Bunby
CASE NUMBER:	1820888
DIBP REFERENCE(S):	BCC2017/4287541
MEMBER:	Andrew McLean Williams
DATE:	15 January 2021
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first-named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas: • Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.

Statement made on 15 January 2021 at 3:10pm

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) visa – Subclass 186 (Employer Nomination Scheme) – false or misleading information in visa application – secondary applicant wife’s criminal conviction not declared – compelling or compassionate reasons justifying grant of visa – circumstances of offence by wife against husband – payment of fine and understanding that no conviction was recorded – no further public concern – value of applicants’ work to employers – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), r 1.03, Schedule 2, cl 186.213, Schedule 4, criterion 4020(1), (4)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 July 2018 refusing to grant the applicants Employer Nomination (Permanent) visas, under s.65 of the *Migration Act 1958* ('the Act').
5. The applicants applied for the visas on 15 November 2017. The delegate refused to grant the visas on the basis that the first-named applicant ('the applicant') did not satisfy the requirements of cl.186.213 of Schedule 2 to the *Migration Regulations 1994* (the Regulations), because there was evidence, contrary to the requirements of public interest criteria ('PIC') 4020, that the applicant had provided information in relation to the application that was 'false or misleading in a material particular', and the delegate was not satisfied, in accordance with subclause PIC 4020(4), that there were circumstances that would nonetheless justify the granting of the visa.
6. The applicants appeared before the Tribunal in person on 15 January 2021 to give evidence and make submissions. The Tribunal also received oral evidence from Mr Greg Strydom, who is the employer representative of Mr Bunby, and Mr Adolfo Salvatore, who is the employer representative for Mrs Bunby.
7. The applicants were represented in relation to the review by their registered migration agent, Mr Gavin Edward Stocks (MARN 1466786) of TOTM Migration, Mr Stocks also appeared before the Tribunal on 15 January 2021, by means of video-link from Sydney, accompanied also by Mr George Lombard and other TOTM staff. Prior to the hearing, Mr Stocks had also provided detailed written submission on behalf his clients (those dated 3 September 2020). At the hearing Mr Stocks additionally requested that the Tribunal have some regard to submissions previously prepared by the applicant's former representative, as were originally addressed to the delegate, and dated 6 July 2018.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 ('PIC 4020') as required by cl.186.213 for the grant of the visa. Broadly speaking, this requires that:
 - there be no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a 'bogus document' or 'information that is false or misleading in a material particular' in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant either knowingly, or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. In this case on 15 November 2017 the applicant caused to be lodged an Application for Permanent Employer Sponsored or Nominated Visa (class 186) with the Department. That form contained necessary relevant information pertaining to each member of his family. On page 21 of that application, the form asks: "Has any applicant ever been convicted of an offence in any country (including any conviction which has now been removed from official records)"? In response, the applicant indicated: "No".
15. Yet, a UK Police Certificate subsequently revealed to the Department that the applicant's wife, Mrs Mandy Elizabeth Bunby (nee James) had been convicted by the Sussex Central Magistrates Court on 21 January 2009 on one count of Battery, resulting in a fine of 80GBP. In light of that police certificate, the answer given by the applicant on the visa application as described in the immediately preceding paragraph did contain information that was false or misleading in a material particular, thus enlivening PIC 4020(1).
16. There is no evidence nor any suggestion that the applicants have provided a 'bogus document', as defined. Neither the applicant nor his wife now contest the fact that the visa application form contains information that is false or misleading in a material particular.
17. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

18. The requirements of PIC 4020(1) and (2) may however be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
19. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
21. For the reasons that follow, the Tribunal is satisfied that the requirements should now be waived.

22. Circumstances of the false information

23. The written and oral submissions of each of Mr and Mrs Bunby amply described the circumstances in which Mrs Bunby came to be convicted in the United Kingdom on 21 January 2009. Shortly before that date, Mrs Bunby had given birth to her second child, and was then at home with the full-time care of three children (including two infants), whilst also suffering from post-natal depression. Mr Bunby was working long hours and often not home. Mrs Bunby felt depressed and isolated. There is medical evidence before the Tribunal to confirm the fact of her then having post-natal depression. After an argument in the back garden one day, Mrs Bunby slapped her husband. The following day Mr Bunby contacted the police requesting advice regarding what he perceived to be her increasingly erratic behaviour. Although this was not intended by the applicant, this police inquiry had the effect of the police attending at their home and charging Mrs Bunby with the offence of battery.
24. When the matter went to court, Mr Bunby says that he expressed the clear wish to the Magistrate that the charge be dropped. Mrs Bunby was fined 80 pounds (plus court costs). In light of Mr Bunby - as the putative victim - having informed the Magistrate that he did not want to have his partner charged – each of the applicant and Mrs Bunby were of the mistaken understanding that the fine received by Mrs Bunby on 21 September 2009 was the end of the matter, and there was to be no conviction. That belief has been the cause of the false information unwittingly provided on the visa application form, more than eight years later. The Tribunal accepts that explanation, and concludes that the false information was provided unwittingly. Given the circumstances and context of the offence in question, the Tribunal also concludes the fact of the conviction to be a matter of no further public concern.
25. The applicants submit that PIC 4020(1) ought be waived, by reason of 'compelling circumstances' that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the granting of the visa.
26. The applicant is employed by the Frizelle Sunshine Group as a senior technician (motor mechanic) at their Volkswagen dealership, at Robina. Mr Gregory Strydom, is the Frizelle Sunshine Group General Manager and is the applicant's employer. In his evidence before the Tribunal Mr Strydom informed that the applicant is a very experienced technician who is now integral to the ongoing viability of their mechanical workshop at Robina. The applicant

could not be replaced without considerable difficulty and disruption within the enterprise, and his loss to the business would have immediate and significant financial consequences. Mr Bunby also has supervision and mentorship responsibilities for a number of young Australian apprentices, and the continuity of their training would be placed at risk in the event that the applicant were not to be available to continue to supervise them.

27. The Tribunal also received oral and written evidence from Mrs Bunby's immediate employment supervisor, Mr Adolfo Salvatore, who is the Northern Region After-sales Manager for the Hyundai Motor Company, Australia. Mr Salvatore explained that the Northern Region after-sales section caters for the requirements of 31 Hyundai dealerships. Mrs Bunby as an area after-sales manager then has direct responsibility for servicing the needs of 13 of these franchise operators, as well as having a high level of understanding of the needs of about ten others. Mr Salvatore regards Mrs Bunby as integral to the Hyundai business in Australia and now informs the Tribunal that the business relationships that Mrs Bunby has developed with Hyundai's franchisees is a matter that could not be easily or quickly replicated. In the event that Mrs Bunby had to be replaced, the estimated direct cost to Hyundai Australia to recruit and train a replacement would be in the order of an estimated \$A300,000. In addition, Mr Salvatore expressed the view that Mrs Bunby's subject matter expertise is of vital importance to the market viability of the each of the franchisee's that are her day-to-day clientele.
28. The Tribunal accepts all of the evidence given by Mr Strydom and by Mr Salvatore. In light of it, the Tribunal feels sufficiently persuaded that there are now compelling circumstances impacting the interests of Australian citizens, Australian permanent residents or eligible New Zealand citizens, sufficient to justify the granting of the visa, notwithstanding PIC 4020(1). Therefore, the requirements of PIC 4020(1) should be waived in this case.

Has the applicant satisfied the identity requirements?

29. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal that indicates that the applicant's identity is under question.
30. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

31. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
32. There is no evidence before the Tribunal that indicates that the applicants have been refused visas because of a failure to satisfy the identity requirements in PIC 4020(2A). Therefore, PIC 4020(2B) does not apply.
33. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.186.213.

DECISION

34. The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first-named applicant meets the following criteria for Subclass 186 - Employer Nomination Scheme visas:

- Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.

Andrew McLean Williams
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...